Supreme Court, U. S.
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No. 76-1300

IN THE

Supreme Court of the United States

October Term, 1976

STATE OF NEW MEXICO,
Petitioner,

vs.

RUDOLPH WARREN HUDSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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IN THE

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October Term, 1976

No._____

STATE OF NEW MEXICO,
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vs.

RUDOLPH WARREN HUDSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

COMES NOW the Petitioner, State of New Mexico, through its attorneys, Toney Anaya, Attorney General, Don Montoya, Assistant Attorney General, and Michael Francke, Assistant Attorney General, and petitions this Court for writ of certiorari to the Supreme Court of the State of New Mexico.

OPINION BELOW

The Respondent's appeal was originally taken to the Court of Appeals of the State of New Mexico which notified the Respondent that the Court of Appeals proposed summary

affirmance of the conviction in that the issues presented on appeal had been dispositively decided and answered by previous decisions of the Supreme Court or Court of Appeals. The proposed Summary Affirmance Notice is contained in the appendix and attached at page A 9. The procedure for summary affirmance on appeal is established through Section 41-23 A-601 (b) (1), NMSA, 1953 Comp. (1975 Supp.). The Court of Appeals subsequently summarily affirmed the Respondent's conviction in a memorandum decision filed on August 3, 1976. A copy of the memorandum decision is attached in the appendix at page A 10. The Respondent subsequently took certiorari to the New Mexico State Supreme Court, which court granted certiorari and rendered the opinion which is the subject of this petition. A copy of the opinion is attached in the appendix at pages A 11 to A 17.

STATEMENT OF JURISDICTIONAL GROUNDS

The date of the opinion of the Supreme Court sought to be reviewed was entered and filed on December 20, 1976. The opinion is reported at 89 N.M.____, ____ P.2d ____ (1976).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3), 1966.

QUESTIONS PRESENTED FOR REVIEW

In the absence of a statement in the search warrant detailing the manner in which the information was gathered, does the information contained in the search warrant in this case describe the accused's criminal activity in sufficient detail so that the magistrate knew that he was relying on something more substantial than casual rumor.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4 of the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A search warrant was issued by a magistrate on February 3, 1976 for a search of the Respondent's home. The search was conducted on the same day, and the officers seized marijuana and lysergic acid diethylamide. Defendant was indicted and convicted for possession of marijuana over an ounce but less than eight ounces and possession of lysergic acid diethylamide contrary to Sections 54-11-23 (B) (2) and (4), NMSA, 1953 Comp. (1975 Supp.).

The search warrant was issued after the Respondent was stopped by the city police of Alamogordo, New Mexico, and searched without a warrant. At that time, suspected marijuana was found. As a result of this search and information obtained from a confidential informant, the search warrant at issue here was obtained for the search of the appellant's home in Tularosa, New Mexico. Upon motion and hearing in the trial court, the trial court suppressed the evidence found upon the Respondent at the time he was initially stopped, and struck out all references in the search warrant to the first search in making its determination of whether the affidavit then stated sufficient probable cause to conduct a search of the Respondent's home.

The trial court found that the search warrant as it then stood provided sufficient probable cause for the search. The Court of Appeals, upon appeal by the Respondent from his conviction, summarily affirmed the order of the trial court denying the defendant's motion to suppress evidence seized at the Respondent's home. Respondent then took certiorari to the New Mexico State Supreme Court which, by published opinion, reversed the decision of the Court of Appeals and held that the affidavit for the search warrant contained insufficient information concerning the underlying circumstances from which the informant

concluded that the controlled substances were where he claimed they were.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

The federal question sought to be reviewed was raised in the first instance by the Respondent's motion to suppress the evidence seized in his home. The issue was again raised in the Court of Appeals upon appeal by the Respondent of his conviction for the possessions of the controlled substances which were seized. Finally, the federal question was raised upon petition for writ of certiorari to the Court of Appeals which was filed in the Supreme Court by the Respondent upon the summary affirmance of his conviction.

At all stages of the proceedings, the Respondent conceded that the search warrant contained a sufficient statement of the underlying circumstances from which the magistrate could conclude that the informant was credible and his information reliable. However, the Respondent contended the search warrant failed to contain sufficient information as to the underlying circumstances from which the informant concluded that the controlled substances were where he claimed they were. The search warrant contained the following information.

> Information was received by the affiant from a reliable and credible confidential source that the named defendant, Rudolph W. "Rudy" Hudson had obtained a quantity of controlled substances including marijuana in bulk form and that he had broken those materials down into smaller quantities for a sale to users throughout Otero County. The confidential source related that Hudson had obtained marijuana in bricks and was packaging it into baggies at his residence in Tularosa, New Mexico. The confidential source related that Hudson wpld [sic] [would] be taking the controlled substance to Alamogordo for sale to users and was en route there at the time of this telephone call to the affiant. The confidential source has provided the affiant with information concerning illicit drug use and trafficking within Otero County many times during the past two years and his information has always proven reliable. It resulted in the seizure of illicit drugs and the arrest and convictions of suspects. (Appendix, page 6.)

In the case of *Aguilar v. Texas,* 378 U.S. 108 (1964) this Court stated:

> Although an affidavit may be based upon hearsay information and need not reflect the direct personal observations of the affiant, (citation omitted) the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, (citation omitted) was "credible" or his information "reliable."

The Supreme Court in the case at bar conceded that the search warrant contains sufficient underlying circumstances from which the magistrate could conclude that the informant was credible and his information reliable. However, the Court went on to state:

> We hold that the factual bases alleged in the aforementioned search warrant were insufficient to issue the search warrant. First, it is impossible to ascertain whether the informant personally saw that Hudson possessed bricks of marijuana and other controlled substances and that he was breaking them down into smaller quantities, or whether the informant was basing these allegations upon another person's personal knowledge thereof, or whether the informant may have heard that a shipment of marijuana had recently arrived in Tularosa and inferred therefrom that petitioner received it and had to break down the bricks in order to distribute the marijuana. *The informant failed to give detailed information which would tend to persuade a neutral and detached magistrate that controlled substances indeed had arrived and were being distributed. The search warrant merely stated conclusions* alleging possession, parcelling and distribution. *This fails to meet one of the tests enunciated in Aguilar.* . . . (Emphasis supplied.)

Three justices of the Supreme Court concurred in the opinion and two justices dissented without opinion.

In the case of *Spinelli v. United States,* 393 U.S. 410 (1969), this Court delineated the manner in which the two-pronged test established in *Aguilar v. Texas, supra,* should be applied in certain circumstances. Considering the first of the two prongs, that is, whether the affidavit contains a sufficient statement of the underlying circumstances from which the affiant concluded that the informant knew that the criminal activity was at foot, this Court stated:

> *In* the *absence of a statement detailing the manner in which the information was gathered, it is* especially *important that the tip describe the* accused's *criminal activities in sufficient detail so that the magistrate may know that he is relying on something more* substantial *than casual rumor* circulating in the underworld *or an* accusation based merely on an *individual's general reputation.* (Emphasis supplied.)

While the New Mexico State Supreme Court even cited the above quoted language in their opinion, the obvious intent and purpose of the language was never considered. In *Spinelli, supra,* this Court took great pains to point out exactly what it meant by the description of the accused's criminal activity in sufficient detail so that the magistrate would know that he is relying on something more substantial than rumor or general reputation by specifically citing to the case of *Draper v. United States,* 358 U.S. 307 (1959). This Court pointed out that in *Draper, supra,* the FBI's informer failed to state the manner in which he had obtained his information, but reported the criminal activities of the defendant in such detail so that:

> A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way.

State as well as federal courts have had an opportunity to utilize the specificity of detail in the affidavit itself to satisfy the requirement in *Aguilar, supra,* that the affidavit must describe the manner in which the information was obtained. See *State v. Bankhead,* 30 Utah 2d, 135 514 P.2d 800 (1973); *Weeks v.*

Estelle, 531 F.2d 780 (5th Cir. 1976); *United States v. Allsenberri,* 424 F.2d 1209 (7th Cir. 1976).

In the case at bar, a similar degree of specific detail in the search warrant is apparent. The search warrant indicated that:

(1) the defendant had obtained a quantity of controlled substances including marijuana in bulk form;

(2) the substance had been broken down into smaller quantities;

(3) once broken down the materials would be distributed to users in Otero County;

(4) the defendant had obtained marijuana in "bricks" and was packaging it into baggies at his residence in Tularosa, New Mexico;

(5) the defendant would be taking the baggies to Alamogordo for sale to users, and that the defendant was en route to Alamogordo at the time that the informant was providing his information.

Based on this information the magistrate could assure itself that the affidavit was not based on rumor circulated in the underworld or merely on the defendant's reputation. *Spinelli, supra.*

In *Spinelli, supra,* Justice White in his concurring opinion indicated that "the Draper approach would reasonably justify the issuance of a warrant in this case. . ." However, Justice White joined in the opinion in *Spinelli, supra,* recognizing the "tension between Draper v. United States, supra," on the one hand and *Nathanson v. United States,* 290 U.S. 41, and *Aguilar v. Texas, supra,* on the other. "[P]ending full scale reconsideration" of *Draper* "and of the Nathanson-Aguilar cases," Justice White joined "the opinion of the court. . . especially since a vote to affirm would produce an equally divided court." 393 U.S. at 429. See also *United States v. Janis,* ____ U.S. ____ 49 L.Ed. 2d 1046, footnote No. 1.

The present case provides the opportunity for the "full scale reconsideration" referenced by Justice White on the issue of

whether an informant's report, if sufficiently detailed, will, in effect, verify itself so that a magistrate, when confronted with such detail, could reasonably find that the informant had gained his information in a reliable way.

The practical effect of the necessity of the recognition of the self-verifying rule of law was noted, in part, in footnote No. 1 of *United States v. Janis, supra.* In that footnote this Court stated that it may be "necessary for the informant's safety, and his future usefulness to law enforcement officers, that his identity be kept secret." The requirement of specificity in the search warrant by the affiant as to how the informant obtained his information would obviate not only the future usefulness of the informant to law enforcement, but could possibly place the informant's life in danger as such specificity indicating how the informant learned of the criminal activity would necessarily also pinpoint for the defendant who the informant was.

CONCLUSION

The present case presents information which, under the *Draper* approach, would reasonably justify the issuance of the search warrant in this particular case. The "tension" recognized by Justice White in *Spinelli,* and noted by this Court in *Janis, supra,* should be relieved. The present case presents a substantial, judicable federal question and certiorari should issue to the New Mexico State Supreme Court in order to ultimately and definitively answer the questions raised and not specifically answered in *Spinelli, supra.*

Respectfully submitted,

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COURT OF APPEALS OF NEW MEXICO Docket No. 2616

STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs.
RUDOLPH WARREN HUDSON, Defendant-Appellant.

2616

You are hereby notified that:
X Record Proper

Appeal Counsel	Trial Counsel
Wayne A. Jordan P.O.Box 750 Alamogordo 88310	Wayne A. Jordan For Appellant
Attorney General	D.A. For Appellee

Criminal Appeal from District Court Otero (4577)
Possession
Geo. L. Zimmerman Judge

was filed in the above-entitled cause on 7-8-76

This case has been assigned to the Summary CALENDAR.

Summary Affirmance

State v. Torrez 81 NM 521

State v. Everitt 80 NM 41

s/ William R. Hendley, J.

cc: Clerk, Dist. Ct.
D.A.
A.G.
Jordan

Court of Appeals of New Mexico

FILED

July 12, 1976

s/ Hazel M. Davis
Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v. No. 2616

RUDOLPH WARREN HUDSON,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
ZIMMERMAN, Judge

TONEY ANAYA, Attorney General
Santa Fe, New Mexico Attorney for Appellee

WAYNE A. JORDON
SHIPLEY, DURRETT, CONWAY & SANDENAW, P.C.
Alamogordo, New Mexico Attorneys for Appellant

MEMORANDUM

This case was calendared for summary affirmance. Defendant's memorandum in opposition to summary affirmance fails to show cause why there should not be a summary affirmance.

Affirmed. N.M. Crim. App. 601 (b) (1).

IT IS SO ORDERED.

Joe W. Wood
Chief Judge

WE CONCUR:

s/ B.C. Hernandez J.

s/ Ramon Lopez J.

COURT OF APPEALS
OF NEW MEXICO

FILED
Aug 3 1976

s/ Hazel M. Davis
Clerk

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUDOLPH WARREN HUDSON,
Petitioner,

vs. No. 11086

STATE OF NEW MEXICO,
Respondent.

ORIGINAL PROCEEDINGS ON CERTIORARI

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OPINION

SOSA, Justice

This case presents the issues of whether the search warrant set forth probable cause for a search and whether an appeal of a criminal case may be summarily affirmed.

Petitioner-appellant-defendant Rudolph Hudson was charged with possession of marijuana and possession of lysergic acid diethylamide. The jury convicted him of both counts. Petitioner appealed to the Court of Appeals which granted summary affirmance pursuant to N.M.R. Crim. App. 601(b) (1) [Sec. 41-23A-601(b) (1), N.M.S.A. 1953 (Supp. 1975)]. We granted certiorari.

In the final analysis petitioner raises two issues on appeal: (1) the memorandum opinion denied petitioner's right to appeal as guaranteed by N.M. Const. art. 6, Sec.2; and (2) the trial court erroneously denied the motion to suppress evidence because the search warrant was improperly granted. Article 6, Sec. 2 of the New Mexico Constitution gives an aggrieved party "an absolute right to one appeal." Petitioner argues that this right to an appeal means more than a summary disposition by the appellate court, that summary disposition is not an appeal as prescribed by the Constitution. In a criminal appeal he claims that the burden should be on the State to show that the issues have already been decided by the appellate courts and that therefore the cause lacks merit.

Pursuant to N.M. Const. art. 6, Sec. 3 this court has superintending control over all inferior courts, and thus the power to regulate and promulgate rules regarding the pleadings, practice, and procedure affecting the judicial branch of government. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976); State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975); State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936). One of the rules which govern appellate procedure is Rule 601(b) (1), supra. We fail to see how an individual is deprived of this right to an appeal in a criminal case as long as its terms are followed. Rule 601(b) (1) states:

> (b) Decision by Order or Memorandum Opinion. When the court determines that one or more of the following circumstances exists and is dispositive of the case, it may dispose of the case by order or memorandum opinion: (1) the issues presented have been previously decided by the Supreme Court or Court of Appeals; . . . .

The Court of Appeals, in ordering the summary affirmance in this case, cited to State v. Torres, 81 N.M. 521, 469 P.2d 166, (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970), and State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969) as being dispositive of the appeal. That the issues brought up upon appeal were not examined or considered by the Court of

Appeals has not been argued; petitioner apparently seeks a written opinion rather than citations to the law dispositive of the case. New Mexico Const. art. 6, Sec. 2, does not require a written opinion and petitioner has cited no authority in support of this contention. Finally, if he meets the requirements of Sec. 16-7-14 (B), N.M.S.A. 1953 (Supp. 1975) any party may petition for a writ of certiorari if he disagrees with the Court of Appeals' disposition, which is what petitioner did.

Having disposed of the preliminary issue, we now turn to the substantive issue presented by petitioner. That issue is the following: Based upon the matters stated in the search warrant, was it properly issued by the magistrate? Petitioner argues that the search warrant failed to meet part of the two-pronged test first set forth in Aguilar v. Texas, 378 U.S. 108, 114 (1964):

> Although an affidavit may be based upon hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, the magistrate must be informed *of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were,* and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, was "credible" or his information "reliable" (emphasis added).

This test was adopted in N.M.R. Crim. P. 17(f) [Sec. 41-23-17(f), N.M.S.A. 1953 (Supp. 1975)], which states in part:

> Probable Cause. As used in this rule, "probable cause" shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and *for believing that there is a factual basis for the information furnished* (emphasis added).

The State argues that the warrant does meet the test.

The warrant reads as follows:

> Information was received by the affiant from a reliable and credible confidential source that the named defendant, Rudolph W. 'Rudy' Hudson had obtained a quantity of controlled substances including marijuana in bulk form and that he had broken those materials down into smaller quantities for sale to users throughout Otero County. The confidential source related that Hudson had obtained marijuana in bricks and was packaging it into baggies at his residence in Tularosa, New Mexico. The confidential source also related that Hudson wp uld (sic) be taking the controlled substance to Alamogordo for sale to users and was enroute there at the time of this telephone call to the affiant. The confidential source has provided the affiant with information concerning illicit drug use and trafficking within Otero County many times during the past two years and his information has always proven reliable. It resulted in the seizure of illicit drugs and the arrest and convictions of suspects.

The trial court deleted the following portion of the search warrant:

> After this telephone call was received the Defendant Hudson was stopped by Officer Dave Phillips and Detective Ray Bailey and was found to be in possession of seven (7) baggies of marijuana and a number of nandrolled [sic] marijuana cigarettes. A field test indicated the material to be marijuana. This stop was made at 15th & Michigan, Alamogordo, New Mexico at about 5:00 pm, February 3, 1976.

The State failed to preserve as error this deletion by the trial court and failed to appeal it; thus it is not before us. Section 21-10-2.1(B) (2), N.M.S.A. 1953 (Supp. 1975); cf. State v. Buchanan, 78 N.M. 588, 435 P.2d 207 (1967). Had this paragraph been before us, there may have been sufficient corroborative evidence to validate the infirmity of the search warrant, Spinelli v. United States, 393 U.S. 410, 415 (1969), which was, as is discussed below, the insufficient description of the underlying circumstances. However, since the record was not perfected and that paragraph is not before us, we cannot read that corroborating statement into the affidavit for the search warrant.

The issue is: was there a substantial basis for believing that there is a factual basis for the information furnished, or in the words of Aguilar, what were some of the underlying circumstances from which the informant concluded that the controlled substances were where he claimed they were? We hold that the factual bases alleged in the aforementioned search warrant were insufficient to issue the search warrant. First, it is impossible to ascertain whether the informant personally saw that Hudson possessed bricks of marijuana and other controlled substances and that he was breaking them down into smaller quantities, or whether the informant was basing these allegations upon another person's personal knowledge thereof, or whether the informant may have heard that a shipment of marijuana had recently arrived in Tularosa and inferred therefrom that petitioner received it and had to break down the bricks in order to distribute the marijuana. The informant failed to give detailed information which would tend to persuade a neutral and detached magistrate that controlled substances indeed had arrived and were being distributed. The search warrant merely stated conclusions alleging possession, parcelling and distribution. This fails to meet one of the tests enunciated in Aguilar and in N.M.R. Crim. P. 17, supra.

In a case much like the one before us, the United States Supreme Court in Spinelli v. United States, supra, further elaborated upon the requirement of the factual circumstances underlying an informant's tip. There the confidential reliable informant told the FBI that " '. . . William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers Wydown 4-0029 and Wydown 4-0136.' " This and other described activity were contained in the affidavit for search warrant. The majority then held that the informant's information was also insufficient:

> The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his

information – it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Cf. Jaben v. United States, 381 U.S. 214 (1965). In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation. 393 U.S. at 416.

State v. Everett, supra, offers no support for the Court of Appeals' summary affirmance, because there the only search pursuant to a search warrant was not contested. State v. Torres, supra, is on point but there the affidavit had sufficient specificity to allow the magistrate to issue the search warrant and the facts were within the personal knowledge of the affiant. See also State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974); State v. Montoya, 86 N.M. 119, 520 P.2d 275 (Ct. App. 1974) (special concurrence); State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973); State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), rev'd on other grounds; State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973); cf. In Re One 1967 Peterbilt Tractor, Etc., 84 N.M. 652, 506 P.2d 1199 (1973); State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

The trial court and the Court of Appeals are reversed. The case is remanded to proceed in a manner consistent herewith.

S/ Dan Sosa Jr.
JUSTICE

WE CONCUR:

s/ Samuel Z. Montoya J.

s/ Mack Easley J.

WE DISSENT:

s/ La Fel E. Oman C. J.

s/ John B. McManus, Jr. J.